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Supreme Court U.S.
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No. 00-121

In the
SUPREME COURT OF THE UNITED STATES

GEORGE DUNCAN

Petitioner

v.

SHERMAN WALKER

Respondent

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

BRIEF FOR AMICUS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

Leon Friedman
Counsel of Record
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400

Joshua L. Dratel
14 Wall Street
New York, N.Y. 10005
(212) 732-0707

Attorneys for Amicus

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BRIEF OF AMICUS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This brief amicus curiae is submitted in support of Respondent Sherman Walker. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. [1]

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

In NACDL's view, the Second Circuit properly interpreted the tolling provision of 28 U.S.C. §2244(d)(2). That provision tolls the one-year limitations period for state prisoners who file a petition for habeas corpus. The

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[1] As required by Rule 37.6 of this Court, amicus curiae submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than amicus curiae, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

toll operates for the period of time that "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. . . ." The point of the limitations period is to require state prisoners to press their constitutional claims quickly through the state courts. Prisoners who do all that they can do in submitting their claims to the state courts and then file a habeas corpus petition in federal court (which is what happened here) have followed the purpose and aim of the AEDPA. They should not be penalized by having the time during which they were actively (but erroneously) pressing their premature claims in federal court count against the one-year time "bank" provided in the statute. Deducting the time when a premature federal claim was pending does not advance the goals of the law and sets a totally unfair trap for state prisoners who often proceed pro se and may be confused as to whether their claims were exhausted or not.

For these reasons, Amicus believes that the judgment below should be affirmed and submits this amicus brief to aid the Court in its consideration of the matter.

STATEMENT

Amicus adopts Respondent's statement of the case.

SUMMARY OF ARGUMENT

Section 2244(d)(2) provides for a one-year limitations period for state prisoners bringing habeas corpus petitions. The period in which a state prisoner is actively pursuing state remedies tolls the one-year limitations period. The toll should also operate when a

state prisoner is pursuing federal habeas remedies since such remedies are covered by the statutory language "other collateral review."

More important, this interpretation advances the goals of the limitations provision. The purpose of Section 2244 was to require state prisoners to actively pursue state remedies as quickly as possible and not to delay presentation of their constitutional claims in federal court. If a state prisoner presents his or her state claims and then prematurely files a federal habeas petition (which may contain some unexhausted claims) he or she is not delaying presentation of any federal claim, the very problem which the law was meant to resolve. Since many prisoners act pro se and may rush into federal court prematurely, they should not be penalized for their early entry into federal court, as this Court recognized in a different context in *Slack v. McDaniel*, 529 U.S. 473 (2000).

ARGUMENT

THE LIMITATIONS PERIOD CONTAINED IN SECTION 2244 SHOULD BE TOLLED DURING THE PENDENCY OF A FEDERAL HABEAS CORPUS PETITION OR OTHER FEDERAL ACTION

Section 2244 is a newly enacted provision in the AEDPA. That section generally provides that a state prisoner must actively pursue and exhaust all of his or her state court remedies before filing a habeas corpus petition in federal court. Every day in which he or she is not actively pursuing the available state remedies counts against a one-year limitations "bank." The law provides:

> **(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . . .
>
> **(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The question presented in this case is whether the term "other collateral review" encompasses the time during which a state prisoner is pursuing federal habeas review, or does it only cover the time when he or she is in state court, pursuing state remedies. Based on strict analysis of the statutory language, it would appear that the Second Circuit's decision is the correct one. More important, the Second Circuit's holding furthers both the aim and purpose of the new statutory provision.

The problem that the law was designed to solve was the long interval before state prisoners (often facing the death penalty) would bring their claims into federal court on habeas corpus, thereby postponing their execution date. Former Rule 9(a) of the *Rules Governing Section 2254 Cases*, contained a presumptive five-year laches rule which was not, strictly speaking, a limitations period. Since there was no strict time limitation for bringing habeas claims, state prisoners could engage in long delay before pursuing federal remedies.

One of sponsors of the AEDPA, Senator Arlen Specter, explained the purpose of the one-year limitations rule:

> There is [presently] no statute of limitations for filing habeas corpus petitions. This leads inmates who have been sentenced to death to wait until they are facing their imminent execution *before filing their habeas corpus petition in Federal court.* An example of this abuse is the case of Stephen Duffey in Pennsylvania. Duffey murdered his victim in 1984. His conviction was finally upheld by the Pennsylvania courts in 1988. His death warrant was not signed until 1994, 10 years after the murder. It was only when the death warrant was signed by the Governor that Duffey first sought habeas corpus review in Federal court. 142 Cong. Rec. S3471. (April 17, 1996) (emphasis added)

For that reason, Congress placed an important barrier against habeas corpus review being sought by state prisoners who were not actively pursuing their state remedies. This Court recently explained in *Artuz v. Bennett*, 121 S.Ct. 361, 365 (2000) that the purpose of Section 2244 was to promote the "exhaustion of available *state* remedies -- which is the object of § 2244(d)(2)." (emphasis added).

Thus Section 2244(d)(2) can be understand to encourage, indeed, to require, state prisoners to be actively involved in pressing their post-conviction claims in state court. If a state prisoner has been actively doing so and then prematurely files a federal habeas corpus petition containing issues which had not been exhausted in state court, certain consequences follow.

First, as this Court noted in *Slack v. McDaniel*, 529 U.S. 473 (2000), a second petition filed after the first petition was dismissed on exhaustion grounds is not to be treated as a "successor petition," barred under 28 U.S.C §2244(b)(2).

> A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* [455 U.S. 509 (1982),] before the district court adjudicated any claims is to be treated as "any other first petition" and is not a second or successive petition. 529 U.S. at 487.

Second, this Court emphasized that the reason for permitting a subsequent habeas corpus petition to be filed after the first was dismissed on exhaustion grounds was that it recognized the procedural traps confronting a state prisoner, who was often proceeding pro se. This Court noted:

> The proposed rule would bar the prisoner from raising nonfrivolous claims developed in the subsequent state exhaustion proceedings contemplated by the *Rose* [*v. Lundy*] dismissal, even though a federal court had yet to review a single constitutional claim. This result would be contrary to our admonition that the complete exhaustion rule is not to "trap the unwary pro se prisoner." *Rose*, 455 U.S., at 520, (internal quotation marks omitted). 529 U.S. at 487.

But the rule proposed by Petitioner here would totally undermine this Court's decision in *Slack* and create precisely the same "trap for the unwary pro se prisoner" which this Court condemned in that case. Instead of the habeas corpus petition being dismissed on *successor*

grounds, exactly the same type of petition would be dismissed on *limitations* grounds, if the argument put forth by Petitioner is adopted.

This is true because a pro se prisoner in the position of Slack or Respondent would go through the entire state system, believing that their claims had been exhausted. They would then file their habeas petition in federal court, often pro se. The state attorney general would then move to dismiss on the grounds that the claim had not been exhausted. *There is no time limit for a federal court to pass on such an argument, as there is in a death penalty petition.* See 28 U.S.C. §2266. A federal judge could sit on the earlier unexhausted petition for a considerable time, before dismissing the case on exhaustion grounds. [2] By the time the petition was dismissed and the state prisoner either returned to state court to exhaust or filed a new habeas corpus claim with only exhausted claims, the one-year limitations period might well have run, as it did in this case. There is no public policy justification for such a harsh rule.

In a recent interpretation of Section 2244, the Tenth Circuit came to precisely this conclusion. In *Petrick v. Martin*, 236 F.3d 624, 628 (10th Cir. 2001), the Court of Appeals noted:

> Our interpretation is also consistent with the inapplicability of the successiveness rule to a federal petition filed after an initial federal petition is dismissed for failure to exhaust state remedies. When a habeas petitioner returns to federal court

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[2] In this case, the District Court waited three months before finding that the claims in the pro se petition were not exhausted. See 208 F.3d at 358.

> following exhaustion of his or her claims in state court, the second petition is not barred as successive under § 2244(b) or predecessor successiveness rules. *Slack v. McDaniel,* 529 U.S. 473, 484-89 (2000).

The Court explained the unfairness of any contrary reading of the statutory language.

> Not barring a second, post- exhaustion petition as successive would offer little solace to the petitioner whose second petition is dismissed because the limitations period ran while the first petition was pending in federal court. That petitioners, most often pro se, do bring unexhausted claims to federal court is an unfortunate reality, as is the fact that, due to the volume of habeas litigation, the entire limitations period can run while a petition is pending in federal court before being dismissed. 236 F.3d at 628.

Many courts that have considered the matter have noted the unfairness of any other rule. In this case, the Second Circuit stated that the purpose of the AEDPA would be advanced by reading the statutory language as permitting a toll when a federal habeas petition was pending. It noted:

> Moreover, including federal petitions within the meaning of Section 2244(d)(2) will reward petitioners for filing their federal petitions as soon as possible, thus promoting the statutory objective of efficiency in the review of state criminal judgments. Congress enacted the limitations period to spur defendants to file their federal

> habeas petitions more quickly, and reading the tolling provision to encompass federal court consideration of the petitions furthers this goal. Under our reading of the statute, defendants will have an incentive to file their federal petitions right away because this filing will toll the one-year statute of limitations. This tolling is particularly useful for a petitioner if, upon review, the federal court determines that he must return to state court to exhaust his claims. Meanwhile, if the claims are properly before the federal court, this incentive leads to speedier completion of collateral review. 208 F.3d at 360-61.

The Tenth Circuit also noted that the purpose of the AEDPA would be advanced by recognizing the toll for habeas petitions. It noted in *Petrick*:

> We do avoid an interpretation of the AEDPA that would penalize state prisoners for filing a previous federal habeas petition challenging the same conviction or sentence. A contrary interpretation of § 2254(d)(2) would mean that a diligent prisoner who filed his federal petition the very day after his state conviction became final could still be permanently time barred from habeas relief if the district court delayed before dismissing the petition for failure to exhaust. Such a result would not further the timeliness concerns that § 2244(d) was designed to address and would create yet another situation in which "a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review," something the Supreme Court has sought to avoid [citing *Stewart v.. Martinez-Villareal*, 523 U.S. 637, 645, (1998)]

236 F.3d at 628-29.

For the foregoing reasons, the statutory language, providing for a toll of the one-year limitations period while a state prisoner is pursuing "other collateral review," should be read as covering the time within which a federal habeas corpus petition is pending.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Dated: New York, N.Y.
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Respectfully submitted,

Leon Friedman
148 East 78th Street
New York, N.Y. 10021
(212) 737-0400
Counsel of record

Joshua L. Dratel
14 Wall Street
New York, N.Y. 10005
(212) 732-0707

Attorneys for Amicus